អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

សាធារណៈ / Public

TRIAL CHAMBER

TO: **All Parties, Case 002** **Date: 11 July 2016**

FROM: **NIL Nonn, President of the Trial Chamber**

CC: **All Trial Chamber Judges; Trial Chamber Senior Legal Officer**

SUBJECT: **Decision on NUON Chea Request to Recall Witness PRAK Khan (2-TCW-931)**

1. The Trial Chamber is seised of a request filed on 27 May 2016 by the NUON Chea Defence to (1) reconsider its decision not to grant the Defence additional time to question witness PRAK Khan (2-TCW-931); and thus (2) recall PRAK Khan (2-TCW-931) to testify in relation to the S-21 Security Centre ("Request"; E409, paras 1, 38). The Nuon Chea Defence requests three sessions to complete its questioning of PRAK Khan (2-TCW-931) (E409, para. 38). On 6 June 2016, the Co-Prosecutors filed a response to the Request ("Response"; E409/1). On 8 June 2016, the Trial Chamber granted the NUON Chea Defence request for leave to reply to the Response (email from the Senior Legal Officer, 8 June 2016) and the NUON Chea Defence filed its reply on 14 June 2016 (E409/2).

2. The NUON Chea Defence notes that PRAK Khan (2-TCW-931) testified before the Trial Chamber on 27-28 April and 2 May 2016 and that the Trial Chamber rejected its request for additional time to cross-examine this witness, granting only an additional 15 minutes as compensation for the time taken up by the discussion of legal issues (E409, para. 2).

3. The NUON Chea Defence submits that it intends to elicit evidence from PRAK Khan (2-TCW-931) on six subjects which in its submission are relevant and conducive to ascertaining the truth and are of significance to the case. The subjects referred to by the NUON Chea Defence are (1) alleged blood drawing; (2) rape; (3) the killing of a Vietnamese baby; (4) interrogators' reports and annotations; (5) the specific circumstances relating to three detainees interrogated by PRAK Khan (2-TCW-931); and (6) the "Khmer Rumdoh", "Khmer Sar" and "Khmer Serei" movements (E409, paras 10-16). The NUON Chea Defence further submits that the evidence it intends to explore with PRAK Khan (2-TCW-931) is not cumulative in nature and that most of the expected evidence cannot be obtained from other sources (E409, paras 15-16, E409/2, paras 6-9, 21-22). The NUON Chea Defence submits that it acted with due diligence and made a reasonable request for additional time to question PRAK Khan (2-TCW-931) when it became clear that the time allotted was

inadequate, and that this request was erroneously rejected by the Trial Chamber (E409, para. 17). They further submit that the denial of the request to cross-examine PRAK Khan (2-TCW-931) on live and important issues, which are critical to the case, amounts to a violation of NUON Chea's fair trial rights (E409/2, para. 22).

4. In their Response, the Co-Prosecutors contend that the NUON Chea Defence has failed to demonstrate any legitimate justification for failing to elicit the evidence referred to in the Request when PRAK Khan (2-TCW-931) originally testified (E409/1, para. 6). The Co-Prosecutors submit that the NUON Chea Defence has shown no new circumstance for the Trial Chamber to reconsider its decision not to grant additional time to question PRAK Khan (2-TCW-931) and failed to demonstrate any reason for the Trial Chamber to grant the exceptional remedy of recalling him as a witness (E409/1, paras 6-7). More specifically the Co-Prosecutors argue that the NUON Chea Defence has failed to show that the expected evidence was of significant probative value and not cumulative (E409/1, paras 7-14).

5. The Co-Prosecutors submit that the NUON Chea Defence was given a fair and reasonable opportunity to question PRAK Khan (2-TCW-931), but chose to question the witness on issues of marginal relevance to his criminal liability on the assumption that he would be offered more time (E409/1, para. 29). The Co-Prosecutors further submit that, in refusing the NUON Chea Defence request for additional time, the Trial Chamber exercised its discretion fairly and allotted time in a manner commensurate with its duty to ensure an expeditious trial (E409/1, para. 29). Should the Trial Chamber grant the Request, the Co-Prosecutors request that they and the Lead Co-Lawyers for the Civil Parties be granted equal time for additional questioning of PRAK Khan (2-TCW-931), and that the NUON Chea Defence be required to question the witness first (E409/1, paras 1, 30). The NUON Chea Defence replies that the Co-Prosecutors' request in this regard is unjustified (E409/2, paras 40-43).

6. The Trial Chamber recalls that reconsideration does not form part of the ECCC legal framework. The Trial Chamber will only consider a request anew where a "fresh application justified by new evidence or new circumstances is made" (E347/4, para. 7; E314/5/3 para. 2; E282/2/1/2, para. 3; E299/2, para. 5; E238/11/1, paras 7-8; E292/2/1, para. 4).

7. Similarly the ECCC legal framework does not make specific provision for the recalling of individuals to provide additional testimony. In previous decisions on requests to recall individuals, the Trial Chamber has considered whether recalling an individual would be conducive to ascertaining the truth, in accordance with Rule 87(4) of the Internal Rules, or otherwise in the interests of justice (E293, para. 13, E302/5, para. 8). Having regard to the practice in other international tribunals, the Trial Chamber is satisfied that in order to recall a witness, the requesting party should demonstrate good cause to do so. In assessing whether there is good cause to recall a witness, the Trial Chamber will have regard to the evidence which the requesting party expects to elicit and the justification for not eliciting that evidence when the witness originally testified. The Trial Chamber will also assess whether the evidence is of significant probative value and not cumulative in nature (See e.g. Case No. IT-95-5/18-T, *Prosecutor v. Karadžić*, Public Redacted Version of "Decision on Accused's Motion to Recall KDZ080 and for Rescission of Protective Measures" issued on 3 July 2013, 12 March 2015, paras 7-8 and decisions cited therein).

8. The Trial Chamber notes that prior to his appearance this year in Case 002/02, PRAK Khan (2-TCW-931) had previously testified as a witness at the ECCC, including during Case 001, and had been interviewed as part of the extensive judicial investigation process at the ECCC (See e.g. E3/10572, E3/79). These factors informed the decision of the Trial Chamber in allocating the appropriate time to allow the parties to test his evidence in this case. The NUON Chea Defence and KHIEU Samphan Defence were given a total of one day to question PRAK Khan (2-TCW-931), during which the NUON Chea Defence questioned PRAK Khan (2-TCW-931) for approximately three and a half hours. These factors, as well as the need to facilitate the smooth and expeditious conduct of the trial, were also considered by the Trial Chamber in deciding not to grant the NUON Chea Defence additional time to question PRAK Khan (2-TCW-931). In its Request, the NUON Chea Defence has failed to show new evidence or new circumstances which would warrant the Trial Chamber to reconsider this decision.

9. With respect to whether there is good cause to recall the witness, the Trial Chamber has considered the additional evidence which the NUON Chea Defence expects to elicit from PRAK Khan (2-TCW-931) and the justification for not eliciting that evidence when the witness originally testified. In view of the probative value and the cumulative nature of the expected evidence, the Chamber is not persuaded that further testimony of PRAK Khan (2-TCW-931) on the issues in question would warrant recalling him. Further, the Chamber considers that the NUON Chea Defence was provided adequate time to elicit the desired information during PRAK Khan (2-TCW-931)'s appearance before the Chamber in this case. The Defence was free to use the allotted time as it wished and could have tested PRAK Khan (2-TCW-931)'s testimony on the subjects now referred to in its Request. Its choice to test other evidence instead is not an adequate justification to recall the Witness. The Trial Chamber therefore finds that the NUON Chea Defence has failed to show good cause to grant the exceptional measure of recalling PRAK Khan (2-TCW-931) as a witness.

10. This constitutes the Chamber's official response to E409.